

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: April 23, 1997

TO : Willie L. Clark, Jr., Regional Director
Region 11

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: North Carolina Shipping Association Wilmington, NC
Case 11-CA-1700

International Longshoremen's Association, Local 1426
Case 11-CB-2661

524-5096-2514
524-5096-2514-6000
524-5096-2584
524-5096-7525
524-5096-7562

These Section 8(a)(1) and (3) and Section 8(b)(1)(A) and (2) cases were submitted for advice as to whether an employer association violated the Act when "headers", who are agents of the Union and of employer/members of the employer association, did not choose the Charging Party to work on a loading gang for arbitrary and invidious reasons.¹

FACTS

Background

The Union has an agreement with the North Carolina Shipping Association (Association) through which the member employers of the Association get referrals of longshoremen from the International Longshoremen's Association, Local 1426's (Union) hiring hall. The Association is a non-profit corporation which exists solely for the purpose of

¹ The Region concluded that a Section 8(b)(1)(A) complaint should issue against the Union alleging that the Union violated the Act by the refusal of Header Scipio Hawkins to select the Charging Party for his loading gang for arbitrary and invidious reasons. This issue has not been submitted for advice.

representing five stevedoring companies and one line-handling company in Wilmington, North Carolina, in the negotiation and administration of collective bargaining agreements with the Union. The Association has no income or assets of its own. The member companies pay assessments to the Association which are used to cover the Association's administrative expenses. The Association itself does not employ union labor. Neither is the Association responsible for making contributions to the Union's pension and welfare funds. The Association is purely a multi-employer collective bargaining association.

The Union serves as the exclusive hiring agent for the member employers of the Association to provide longshoremen for loading and unloading work in the port of Wilmington. This practice is embodied in an agreement known as the "Wilmington North Carolina Longshore Seniority Plan", revised October 1, 1992.² At the port of Wilmington, regular work crews are referred to as working "gangs." There are from fifteen to eighteen loading gangs, with twelve people assigned to each such gang, and three carpenter gangs. On the loading gangs, there are forklift operators, crane operators, laborers, a flagman, and a hatch tender. Gangs work in rotation in two day cycles as work is available.

Each gang is supervised by a "header" who is chosen by the member employers of the Association, but upon recommendation of the Union. Under the agreement between the Union and the Association, the header has the authority to hire individuals to work on the gang, and has authority to "check a man out," that is, send him home from work, and take him off the gang, if he is not working. Headers generally do not perform loading work themselves, but devote themselves entirely to supervising the work of the gang. The Region has concluded that headers are supervisors within the meaning of Section 2(11) of the Act and does not submit this issue for advice.³

² The Charging Party does not allege, nor does the Region find, that the seniority plan itself is invalid. The Charging Party is contending only that the seniority plan has been applied in an unlawful manner.

Gangs consist of certain permanent members who are assigned to the gang based on seniority. All permanent members "shape-up", i.e. appear for assigned work, at a designated time. If a vacancy occurs in the gang due to absence or the need for additional men, the header is supposed to select within plan seniority guidelines those longshoremen available on the floor at the Union hall, provided they have the qualifications to perform the work.

In North Carolina Shipping Association, Cases 11-CA-16155 and 11-CB-2483, JD(ATL)--55--96 (September 12, 1996), the ALJ specifically found that Southeast Crescent Shipping Company, Inc., a member of the North Carolina Shipping Association, and the Association violated Section 8(a)(3) and (1) of the Act when a header denied an employee a permanent warehouse gang assignment because of his protected union activities.⁴ The ALJ also found that the Union violated Section 8(b)(1)(A) and (2) of the Act by discriminating against the employee by refusing to refer him because of his union activities. The charge against the union in Case 11-CB-2483 was filed on July 22, 1994, and the charge against the North Carolina Shipping Association and its member Southeast Crescent Shipping Company, in Case 11-CA-16155, was filed on August 9, 1994. Complaint issued in that case on August 25, 1994 and was tried on April 29 and 30, 1996.

Instant Case

Charging Party Ernest Bellamy has been a member of the Union since August 1991. He was not assigned to any gang when he first began to work. He is currently permanently assigned to a carpenter's gang, which does not work as often as a loading gang. Bellamy was out on disability at the time that a large number of initial loading gang assignments were made in November 1993. Upon his return to

³ In Wilmington Longshoremen's Association, Local 1426 (Wilmington Shipping Company), 294 NLRB 1152, 1157 (1989), the Board affirmed the conclusion of the ALJ that "headers" at the port of Wilmington were Section 2(11) supervisors.

⁴ Id., slip op., p. 9. This case is pending before the Board on exceptions and cross-exceptions.

the docks, he received his permanent assignment to a carpenter's gang.

Bellamy alleges that positions have become available on the loading gangs and that he has been unlawfully denied opportunities to transfer from a carpenter's gang to a loading gang. He alleges that other transfers have taken place from both carpenter's gangs and the floor of the Union's hiring hall to loading gangs. He further alleges that he has been denied transfers to loading gangs for reasons that are arbitrary, invidious and unfair, that is, his place of residence and nepotism. Specifically, Bellamy stated that many of the longshoremen that were transferred to spots on loading gangs were related to other ILA members. Bellamy is not related to any other ILA member. He also asserted that when he asked Scipio Hawkins, a header, about a spot on his gang, Hawkins told Bellamy that he would never choose anyone who was from Brunswick County. Bellamy is from Brunswick County.

Bellamy also stated that he sent a transfer form to Union president William Rowell. Bellamy stated that Rowell informed him that the form was invalid unless signed by a header. Bellamy also alleges that at the June 1996 Union meeting, Union President Wilbert Rowell stated that if anyone else filed more charges against the Union, and lost, the Union would go after those individuals for the money it took to defend the charges.⁵ The Region has apparently concluded that these statements violated Section 8(b)(1)(A) and is not submitting that issue to Advice.

Bellamy filed his charge against the Union, in Case 11-CB-2661, on March 29, 1996. He filed his charge against the Association, in Case 11-CA-17000, on April 29, 1996.

ACTION

⁵ The Charging Party has filed two other charges against the Union; both were dismissed. In Case 11-CB-2409, Bellamy alleged that his March 1, 1994 assignment to a carpenter's gang was not in accordance with seniority. Again, in Case 11-CB-2545, Bellamy challenged the Union's failure and refusal to transfer him to a carpenter's gang.

We conclude that the Region should issue a Section 8(a)(1) and (3) complaint against the Association, absent settlement, for the reasons set forth below.⁶

When an employer delegates its otherwise exclusive hiring authority to a union, that employer may share liability when the union exercises that authority in an unlawful manner. Thus, in Miranda Fuel Co.,⁷ the Board stated: "The right to hire and fire and to control tenure of employment is an employer's alone; and where an employer does delegate or surrender hiring and firing and related authority to a labor organization, the employer is responsible, so far as th[e] Act is concerned, for the unlawful manner in which the [u]nion exercises the delegation."⁸ For example, under this Section 8(a)(3) theory of violation, the Board has held an employer liable for its use of a contractual exclusive hiring hall that a union operates in a racially discriminatory fashion.⁹

⁶ Since we concluded that the Association violated Section 8(a)(3) and (1) of the Act, the Region should also allege that the Union violated Section 8(b)(2) of the Act by causing the Association to discriminate against Bellamy.

⁷ 140 NLRB 181, supplementing 125 NLRB 454 (1959), as remanded at 284 F.2d 861 (2d Cir. 1960), enf. denied 326 F. 172 (2d Cir. 1963). There, the employer violated Section 8(a)(3) when it agreed to the union's improper demand that the contractual seniority of an employee be reduced. The employer had delegated its control over seniority determination to the union.

⁸ 140 NLRB at 188, citation omitted.

⁹ General Cinema Corp., 214 NLRB 1074 (1974). The Board found these Section 8(a)(3) violations in Miranda Fuel and its progeny where the unlawfulness of the union conduct to which the employer acquiesced flowed from its arbitrary or invidious nature, rather than from discriminatory, union motivation. On the other hand, employer conduct, initiated on its own, for arbitrary or invidious, rather than discriminatory reasons may not violate the Act. See, e.g., Jubilee Manufacturing Company, 202 NLRB 272 (1973), affd. 87 LRRM 3168 (1974). See also International Longshoremen's

In Wolf Trap Foundation for the Performing Arts,¹⁰ the Board held that it will not impose upon an employer, which delegates its exclusive authority to a union, strict liability for that union's unlawful exercise of that authority.¹¹ Rather, the Board will now require affirmative evidence demonstrating that the employer knew, or should have known, of the union's unlawful conduct before it will charge that employer with liability under Section 8(a)(3) of the Act. The Board noted that "'where [a contract] requires discrimination, or where the discriminatory acts were widespread or repeated or notorious, the employer might reasonably be charged with notice of those acts.'"¹² Therefore, in Wolf Trap, the Board found that only the charged employers who maintained contracts with the union, which on their face required unlawful discrimination, could be charged with knowledge of that discrimination and thus held liable for the union's unlawful conduct pursuant to those contractual clauses. A third employer, which had no written contract with the union and which could not otherwise be charged with knowledge of the union's discrimination, was absolved of liability for the union's discriminatory actions.

In Pacific Maritime Association,¹³ the Board affirmed the conclusions of the ALJ that the union violated Section 8(b)(1)(A) and (2) by discriminatorily refusing to dispatch

Association, Local 1426 (Wilmington Shipping Company), 294 NLRB 1152 (1989), where the ALJ stated, in dicta, that: "If a header is the employer's hiring agent, he may be arbitrary in the selection as long as union membership considerations or protected activities are not selection factors." Id. at 1157.

¹⁰ 287 NLRB 1040 (1988), overruling Frank Mascali Construction G.C.P. Co., supra, and Q.V.L. Construction, supra.

¹¹ Id., 287 NLRB at 1041.

¹² Id., quoting Lummus Co. v. NLRB, 339 F.2d 728, 737 (D.C. Cir. 1964).

¹³ 209 NLRB 519 (1974).

employees, from a jointly operated employer/union hiring hall, because of their sex. The Board further affirmed the conclusions of the ALJ that the employer association violated Section 8(a)(3) and (1) of the Act by this same conduct.

The Pacific Maritime Association (PMA) was an employer association that consisted of employers engaged in stevedoring or terminal services. The PMA, on behalf of its employer-members, and the International Longshoremen's and Warehousemen's Union (ILA), on behalf of its local unions, entered into a collective bargaining agreement (Agreement) that provided for the establishment of a Joint Port Labor Relations Committee (Committee) for each port covered by the Agreement. The Committee consisted of three or more representatives designated by the ILA, and three or more representatives designated by the PMA, each side having equal voting power. Section 17 of the Agreement provided that the Committee maintain and operate a dispatch or hiring hall. Section 8 of the Agreement stipulated that the dispatch hall operated by the Committee was the exclusive source of employees for signatory employers. The dispatch hall for the port of Wilmington was operated by a Committee consisting of representatives designated by the Association and representatives of Local 52 of the ILA.

The ALJ, affirmed by the Board, concluded that the union violated Section 8(b)(1)(A) and (2) by breaching its duty of fair representation when its agent, a union official of Local 52 of the ILA, who participated in the operation of the dispatch hall, discriminatorily prevented six women from utilizing the dispatch hall solely on the basis of their sex. The Board also affirmed the ALJ's conclusion that the PMA violated Section 8(a)(3) and (1) of the Act by participating, as joint operator of the dispatch hall, in this union conduct found to be violative of Section 8(b)(1)(A). In reaching this conclusion the ALJ noted that the PMA was aware of the union's discrimination in the operation of the dispatch hall.¹⁴

In the recent case of North Carolina Shipping Association, Cases 11-CA-16155 and 11-CB-2483, JD(ATL)--55--96 (September 12, 1996), the ALJ specifically found that

¹⁴ Id. at 525.

Southeast Crescent Shipping Company, Inc., a member of the North Carolina Shipping Association, and the Association violated Section 8(a)(3) and (1) of the Act because a header denied an employee a permanent warehouse gang assignment in retaliation for his union activities.¹⁵ The parties there stipulated that headers were supervisors within the meaning of the Act, and that their actions were therefore clearly attributable to the employers for whom they worked.¹⁶ The ALJ also concluded that headers were dual agents of both the employer/members of the Association and the Union.¹⁷ In their defense, the respondent employer and the Association argued that they could not be held liable for the Union's misconduct, under Wolf Trap Foundation, above, because they did not have knowledge or notice of the Union's unlawful conduct. The ALJ concluded that the principles enunciated in Wolf Trap Foundation were inapplicable since the dual agency status of the header and standard agency principles attribute the knowledge and conduct of the supervisor to the respondent employer. The ALJ further found that, under the Wolf Trap test, the respondent employer knew or reasonably should have known of the conduct of the header because the employer's president knew that the discriminatee had originally been slotted for this position and should have investigated further when the discriminatee did not get the position. The ALJ then concluded that the Association as well as the respondent employer violated Section 8(a)(3) and (1) of the Act, because of the discriminatory conduct of the dual agent header. Accordingly, the ALJ ordered both the Association and the respondent employer to cease and desist from failing and refusing to hire individuals because of their union activity or sentiments, or in any like or related manner, interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

¹⁵ North Carolina Shipping Association, JD(ATL)-55-96, above, slip op., p. 9. This case is pending before the Board on exceptions and cross exceptions.

¹⁶ Id.

¹⁷ Id.

In the instant case, we conclude that the Region should issue a Section 8(a)(3) and (1) complaint against the Association, absent settlement. The Region should argue that the Board's test in Wolf Trap Foundation is met in this case, since the Association knew, or should have known, of the Union's unlawful conduct in operating the hiring hall. In this regard, we note that this same employer association was charged and found to have violated Section 8(a)(3) and (1) of the Act in North Carolina Shipping Association, JD(ATL)--55--96, as a result of the Union's unlawful operation of this same hiring hall. The charge against the Association in that case, 11-CA-16155, was filed on August 9, 1994. Complaint issued in that case on August 25, 1994 and was tried on April 29 and 30, 1996. The allegedly unlawful conduct in the instant case took place on or about October 22, 1995 and continued unabated thereafter. Thus, the Region should argue that the prior litigation against the Respondent Association in North Carolina Shipping Association, JD(ATL)--55--96, put the Association on notice that the Union was or might be operating the hiring hall in an unlawful manner. We conclude, therefore, that the Wolf Trap Foundation test is met here in that the Association knew or should have known of the Union's unlawful conduct in the jointly operated hiring hall and that the Region should allege that the Association violated Section 8(a)(1) and (3) of the Act.

The fact that the refusal to refer in the earlier North Carolina Shipping Association was based on protected union considerations and not arbitrary considerations as involved herein does not change this conclusion. This earlier case should have put the Association on notice that the joint hiring hall was not operating in accordance with the "Wilmington North Carolina Longshore Seniority Plan". In these circumstances, the Association should have investigated as to the manner in which the hiring hall was operated.¹⁸ Consequently, the Region should argue that the

¹⁸ In this regard, it appears that the basis on which the Charging Party was denied employment was not related only to him but was a more widespread practice of referral on the basis of nepotism and denial of referral based on residence. Consequently, an investigation by the Association of the operation of the hiring hall could have discovered this unlawful practice.

Association knew or should have known of the unlawful operation of the hiring hall herein.

The Region should also argue that the Association had knowledge of the unlawful referral herein, under Wolf Trap, on the basis that the knowledge of the header, as a supervisor of an employer member of the Association, should be imputed to the Association. Since the header committed the unfair labor practice, he obviously knew about it. His knowledge, as an agent of an employer member of the Association, arguably can be imputed to the Association which is party to the "Wilmington North Carolina Longshore Seniority Plan" administered by the headers.

We further conclude that the Region should not argue that the Association be held liable for the acts of the header, as its agent, if the Board finds that the Wolf Trap test is not met. In other words, the Region should not argue that the Association violated Section 8(a)(3) and (1) if it did not or should not have known that the Union was operating the dispatch hall in an unlawful manner under Wolf Trap. In reaching this conclusion, we are aware that the ALJ found in North Carolina Shipping Association, JD(ATL)--55--96, that the Wolf Trap test was inapplicable and that the Association should be held liable for the acts of the header, as its agent in denying an employee employment because of his protected union activities.¹⁹ This conclusion is inapplicable to this case because the denial of employment to the Charging Party is based upon arbitrary, invidious considerations, his county of residence and nepotism, rather than protected union activity. The Board has held in Jubilee that an employer does not violate the Act if it discriminates against employees for arbitrary or invidious reasons so long as such discrimination is not based upon protected concerted or union activity.²⁰ Thus, the Association, in this case,

¹⁹ Id., slip op. at p. 10.

²⁰ See, as noted above, ILA, Local 1426 (Wilmington Shipping Company), 294 NLRB 1152, 1156 (1989) (where the ALJ stated in dicta that: "If a header is the employer's hiring agent, he may be arbitrary in the selection as long as union membership considerations or protected activities are not selection factors."

would not be liable solely on the basis that its agent, the header, refused to place Bellamy on a loading gang since that refusal was not based upon Bellamy's protected concerted or union activity. As noted above, the header refused to place Bellamy on a loading gang solely on the basis of nepotism and the location of Bellamy's residence. Such conduct, if engaged in independently by the Association, would not be unlawful under the test set forth by the Board in Jubilee. Under extant Board law, the Association could only be found to have violated the Act in the operation of the hiring hall if the header, acting jointly as the agent of the Association and the Union, violated Section 8(b)(1)(A) by breaching the Union's duty of fair representation. Therefore, the Association cannot be found to have violated the Act without satisfying the Board's test in Wolf Trap.

Accordingly, the Region should issue a Section 8(a)(3) and (1) complaint, absent settlement, against the Association solely on the grounds that the Association jointly managed the dispatch hall with the Union, through the headers, and the Union breached its duty of fair representation by refusing to dispatch Bellamy for arbitrary and invidious reasons in violation of Section 8(b)(1)(A) of the Act.

B.J.K.